Wagner-Smith Company *and* Russell S. Turner. Case 9-CA-16311

July 19, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On January 8, 1982, Administrative Law Judge Martin J. Linsky issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Wagner-Smith Company, Dayton, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the unlawful discharges of Russell S. Turner, Charles Martin, Ray Bennett, and Matthew Heltsley on January 2, 1981, and notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Additionally, Respondent asserts that the Administrative Law Judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

The Administrative Law Judge found that Respondent's foreman, Neary, testified that employee Heltsley told him that he had injured his back as the result of a fall caused by a badly secured piece of sheet metal on a roof at Respondent's jobsite, whereas Neary in fact testified that Heltsley told him about a metal-covered opening on the roof through which he could have fallen. The Administrative Law Judge also erroneously stated that Foreman Neary and General Foreman Helton conceded that requests by the employees for a megger were reasonable. These errors are insufficient to affect our decision.

[2] Respondent contends that the Adminstrative Law Judge's Decision assumes that an individual employee's complaints constitute protected concerted activities when the subject matter of the complaints generally involves terms and conditions of employment. Respondent thereby implicitly suggests that the Administrative Law Judge's finding of a violation was based on *Alleluia Cushion Co., Inc.*, 221 NLRB 999 (1975). However, since we find sufficient evidence in the record that employees Turner, Heltsley, Bennett, and Martin had actually engaged in concerted activities, we find it unnecessary to decide whether their complaints, even if not jointly expressed by two or more of their number, would constitute protected concerted activity within the meaning of Sec. 7 of the Act. Thus, in adopting the Administrative Law Judge's finding that the four employees were discharged because of their concerted complaints, we note the employees' undisputed testimony indicating that they jointly registered complaints directly with Respondent's foremen about the defective wire and apparently about the energizing of the motor control panel. Additionally, we note the testimony of the employees and the union stewards that the stewards in turn brought various complaints to the attention of the foremen. Finally, we note the foremen's testimony indicating that "they" (the employees) complained about pulling defective wire, brought up the issue of safety tags, called the stewards over every day, and discussed their complaints with other employees.

The Administrative Law Judge characterized the employees' complaints as "reasonable in nature" and as "legitimate grievances." However, it is well settled that the merit of a complaint or grievance is irrelevant to the determination of whether an employee's conduct is protected under the Act, so long as the complaint was not made in bad faith. *OMC Stern Drive, a Division of Outboard Marine Corporation*, 253 NLRB 486, fn. 2 (1980), enfd. 676 F.2d 698 (7th Cir. 1982); *John Sexton & Co., a Division of Beatrice Food Co.*, 217 NLRB 80 (1975). We further find, as is implicit from the Administrative Law Judge's Decision, that Respondent has not established that the employees' complaints were made in bad faith.

[3] In sec. 1(b) of his recommended Order, the Administrative Law Judge used the broad cease-and-desist language "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that the narrow cease-and-desist language "in any like or related manner" is appropriate. We shall modify the Administrative Law Judge's recommended Order accordingly.

We also shall modify the Administrative Law Judge's recommended Order so as to require Respondent to expunge from its files any reference to the unlawful discharges of Russell S. Turner, Charles Martin, Ray Bennett, and Matthew Heltsley on January 2, 1981, and to notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT discharge any employees because they engaged in protected concerted activities for mutual aid and protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by the National Labor Relations Act.

WE WILL offer Russell S. Turner, Charles Martin, Ray Bennett, and Matthew Heltsley immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any loss of earnings they may have suffered by reason of their unlawful discharges, with interest.

WE WILL expunge from our files any reference to the discharges of Russell S. Turner, Charles Martin, Ray Bennett, and Matthew Heltsley on January 2, 1981, and WE WILL notify them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them.

WAGNER-SMITH COMPANY

DECISION

STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge: This case was heard before me in Dayton, Ohio, on October 1 and 2, 1981. The complaint in this matter was issued by the Regional Director for Region 9 on February 26, 1981, based on a charge filed by Russell S. Turner on January 12, 1981. The complaint alleges that the Wagner-Smith Company (herein Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, when it discharged four of its employees, i.e., Russell S. Turner, Charles Martin, Ray Bennett, and Matthew Heltsley on January 2, 1981, because they engaged in protected concerted activity for mutual aid and protection. Respondent in its answer denied that it violated the Act.

Upon consideration of the entire record, to include post-hearing briefs filed by the General Counsel and Respondent, and upon my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Ohio corporation, with its principal office in Dayton, Ohio, has been engaged in providing electrical services at various locations in the State of Ohio. During the past 12 months, a representative period, Respondent, in the course and conduct of its business operations purchased and received at its Dayton, Ohio, facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

Local 82 of the International Brotherhood of Electrical Workers, AFL-CIO, herein called Union or Local 82, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent was one of approximately 22 contractors working on a construction project in Moraine, Ohio. The project was the construction of a new Chevrolet assembly plant for the manufacture of small trucks. Respondent's contract called for it to do the electrical work for the paint spray booths at the assembly plant. The electricians who worked for Respondent at the site in Moraine were all referred by Local 82 of the International Brotherhood of Electrical Workers. An excellent working relationship had existed for a number of years between Respondent and Local 82 and among the members of Local 82 who were supervisors for Respondent at this jobsite were Ralph "Whitey" Helton, who was general foreman, and William Neary, who was foreman.

The General Counsel alleges that Russell S. Turner, Charles Martin, Ray Bennett, and Matthew Heltsley were all discharged because they concertedly complained about safety conditions on the job and about other working conditions and exercised their right to discuss grievances with agents of Respondent. Respondent avers that the four men were discharged because they were constantly griping without cause and harassing the general foreman, Helton.

If the General Counsel is correct then the four men are entitled to reinstatement with backpay and an appropriate notice should be posted by Respondent. On the other hand, if Respondent is correct or the General Counsel has failed to prove his case then the complaint should be dismissed.

I find that the General Counsel has proved his case by a preponderance of the evidence.

All four of the discharged employees were travelers; that is, they were members of the International Brotherhood of Electrical Workers but were members of locals other than Local 82.

Three of the discharged employees, i.e., Charles Martin, Ray Bennett, and Matthew Heltsley, started working for Respondent on November 11, 1980, while the fourth, Russell S. Turner, started on December 9, 1980.

On January 2, 1981, all four were discharged. Between the dates they started and the date they were terminated all four men complained to the foreman and general foreman about a number of different matters on a number of occasions. On January 2, 1981, all four men were informed by General Foreman Helton that they were being laid off because of a reduction in force at the job. It is an undisputed fact, however, that they were *not* laid off due to a reduction in force caused by less work. The evidence shows that most of the work on the project had not been completed when they were laid off. Further,

when the four discharged employees went to the Local 82 hiring hall immediately after their discharge they learned that Respondent had just put in a request for four additional men at the Moraine jobsite. It is apparent that the replacements were to replace the four men they had just discharged. The credible evidence of record establishes further that Respondent requested upwards of 15 electricians during January 1981 alone.

The fact that Respondent's agent, General Foreman Helton, misrepresented to the four men the reason for their being let go undercuts severely Respondent's position as advanced at the hearing and in its brief; namely, that the men were let go for cause. It is interesting to note that Helton testified that he did not tell the four men they were being discharged for cause rather than being laid off in a reduction in force is because he did not believe on January 2, 1981, that he had sufficient reason to discharge the men for cause. It is only after the complaint was filed in this case and it is obvious that the General Counsel can prove that there was no reduction in force caused by shortage of work that Helton claims in retrospect that he had cause to discharge the men in January 1981.

The credible evidence at the hearing establishes that there were no complaints about the technical competence and skill of three of the four discharged employees and the only complaint about the technical competence and skill of Charles Martin was that he was a slow worker. However, neither at the time of their discharge nor at the hearing and brief stages of this case does Respondent attempt to support its discharge of Charles Martin because he was a slow worker.

Essentially, Respondent maintains that the four discharged employees constantly griped about matters which they claimed were unsafe but were not unsafe or they griped about job conditions which were reasonable and to be expected considering the type of job it was. Their purpose in complaining according to Respondent was to slow down the job so that it would be necessary for the job to be put on overtime and then more overtime so they could make more money which they were in greater need of than other employees because as "travelers" they had to maintain two homes; i.e., a temporary residence where they worked and a permanent residence for their families back home.

The four discharged employees were part of a 10-man crew. Russell S. Turner, who worked for Respondent from December 9, 1980, to January 2, 1981, complained about a number of matters. He complained on December 10, 11, 12, and 30 at a minimum about the condition of the wire he and the others were pulling. He complained that it was "bad wire" with inadequate insulation. He complained that they should have had a "megger" on the jobsite to check the wire for defects. He complained that the system he and the others were working on was energized or made "hot" without warning thereby jeopardizing the safety of Charles Martin and an apprentice electrician named Jeff Schimer who were working in a position where they could easily have been electrocuted. He complained that the floor of the job site was covered with water. He complained that his requests for safety tags and hold tags were not complied with by Respondent. Safety tags are tags or signs carrying various warnings, such as "Dangerous," "High Voltage," etc. Hold tags are color-coded tags on which an electrician working on a circuit would place his name. The hold tag alerts anyone working on a circuit not to energize a circuit without first checking with the person whose name is on the hold tag. While the use at this jobsite of the lock and key method" may have obviated a need for hold tags it did not obviate the need for safety tags.

Matthew Heltsley, Ray Bennett, and Charles Martin all started working for Respondent on November 11, 1980, as noted earlier, and were terminated along with Russell S. Turner on January 2, 1981. During his term of employment for Respondent Charles Martin asked for Safety Tags on numerous occasions. In addition, he complained about the system being energized or made "hot" without prior warning to him at a time when he was working just outside a control panel and could have been electrocuted easily had he stepped into the panel (which was about 8 feet high and 2 feet deep) since there were many exposed "points" inside the panel.

Ray Bennett complained about water on the floor where the men were working, pointing out that this constituted a safety hazard because electrical extension cords were lying in the water. He complained about bad lighting, explaining how it contributed to an injury he sustained when he bumped his knee. The bump left a scar. He also complained about the energizing of the system without prior warning and of the lack of safety tags. He complained as well about the "bad wire" he and Turner and Heltsley were ordered to pull.

Matthew Heltsley complained about water on the floor. He complained about the severe cold where the men were working. He requested a heater for the area which took 3 to 4 weeks to be delivered. He noted that the cold and wet work area resulted in all the men at one time having colds and/or sore throats. He complained about the bad lighting conditions in the stairwells. He explained how he fell and hurt his back at the job, an injury which Foreman William Neary testified Heltsley told him about at the time. The fall was caused by an improperly secured piece of sheet metal on the roof. Heltsley also complained about the "bad wire" he and the others were ordered to pull.

I credit the testimony of Turner, Martin, Bennett, and Heltsley. Their demeanor and the fact that they were corroborated in many areas by Respondent's own witnesses[1] persuades me to credit their testimony. I specifically do *not* credit the testimony of Foreman Neary and General Foreman Helton when they testified that at one or more of the regularly scheduled safety meetings held on Monday mornings that all the men were advised prior to the system being energized that the system was going to be energized or made "hot" and that they should act accordingly.

I find that the complaints made by Turner, Martin, Bennett, and Heltsley were reasonable in nature and were made on behalf of themselves and other workers on

[1] Both General Foreman Helton and Foreman Neary conceded that requests by the men for heat, megger, and safety tags were reasonable and that the wire was bad.

the jobsite and concerned terms and conditions of employment and were, accordingly, protected concerted activity for mutual aid and protection.

I credit the testimony of Joseph Osterfeld, who testified on behalf of Respondent and who was a union steward at the jobsite, when he testified that complaints from one or more of the discharged employees were made approximately once a day but I do not credit his opinion that there was no basis to any of the complaints.

The legitimate grievances of the four discharged employees aggravated General Foreman Helton. Helton was described by Mark B.D. Hartke, another of Respondent's witnesses, as being "hyper." Helton was also described by Foreman William Neary as being under a lot of pressure to get the job done. Mr. Helton impressed me when he testified as an excitable individual. Helton became, I find, simply too fed up with the legitimate grievances of the four discharged employees and fired them. He did not believe he had grounds to discharge for cause so he lied and told them they were being laid off due to a reduction in force caused by lack of work.

ANALYSIS AND REMEDY

Since I find that Turner, Martin, Bennett, and Heltsley were discharged by Respondent because they concertedly complained to Respondent's agents about safety conditions and other terms and conditions of employment I will recommend that Respondent cease and desist from that practice, post an appropriate notice, and reinstate with backpay the four discharged employees. *Waterbeds 'N' Stuff, Inc.*, 238 NLRB 873 (1978); *Centex Construction Company, Inc.*, 258 NLRB 1108 (1981); *WLCY-TV, Inc., a subsidiary of Rahall Communications Corp.*, 241 NLRB 294 (1979). The discharge was a violation of Section 8(a)(1) because they were discharged for exercising rights under Section 7 of the Act. However, since I find that the discharges had nothing to do with the fact of their union membership and Respondent has enjoyed excellent relations with Local 82 the discharges do not violate Section 8(a)(3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Russell S. Turner, Charles Martin, Ray Bennett, and Matthew Heltsley, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law and upon the entire record herein and pursuant to Section 10(c) of the Act, I hereby recommend the issuance of the following:

ORDER[2]

The Respondent, Wagner-Smith Company, Dayton, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because they have engaged in protected concerted activities for mutual aid and protection.

(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights protected by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Russell S. Turner, Charles Martin, Ray Bennett, and Matthew Heltsley immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered from January 2, 1981, said backpay to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as set forth in *Florida Steel Corporation*, 231 NLRB 117 (1977). (See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962)).

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business in Moraine, Ohio, copies of the attached notice marked "Appendix"[3] copies of said notice on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by it in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[2] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."